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IN THE
COURT OF APPEALS OF INDIANA

LARRY CARDWELL,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 82A01-0612-PC-535
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE VANDERBURGH CIRCUIT COURT
The Honorable Carl A. Heldt, Judge
Cause No. 82C01-0307-PC-11

July 12, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellant-Petitioner Larry Cardwell ("Cardwell") appeals the denial of his petition for post-conviction relief. We affirm.

Issues

Cardwell raises four issues, which we consolidate and restate as:

I. Whether Cardwell's guilty plea was valid; and

II. Whether he received ineffective assistance of trial counsel.

Facts and Procedural History

On February 8, 1987, Cardwell took a couch, a television, two vacuum cleaners, a mattress, and box springs from a Goodwill parking lot in Evansville. Three days later, the State charged Cardwell with Theft, as a Class D felony,[1] and filed an allegation that Cardwell was an Habitual Offender.[2]

On April 2, 1987, Cardwell pled guilty to the theft charge pursuant to a plea agreement with the State in exchange for the habitual offender allegation being dismissed. At the hearing, the following exchanges occurred:

> Court: . . . . On the 8th day of February, you are charged with exerting unauthorized control over property in the custody of Goodwill, a couch, a Sylvania brand television set, a vacuum cleaner, a Hoover brand vacuum cleaner, a mattress, box springs, so on . . . with the intent to deprive them of the value and use thereof without their consent. Do you understand the nature of the charge?
>
> Cardwell: Yes.

[1] Ind. Code § 35-43-4-2(a) (1985).

[2] Ind. Code § 35-50-2-8 (Burns 1986 Supp.).

Court: Do you withdraw your plea of [not] guilty and enter a plea of guilty of theft?

Cardwell: Yes.

Court: Do you understand that by your plea of guilty, you are admitting the truth of all the facts alleged in the information and upon entry of such plea, the Court will proceed with judgment and sentence? That is, if it accepts the recommendation of the State of Indiana. Do you understand that?

Cardwell: Yes.

Court: On the 8th of February, did you come into possession of, or did you take possession of some vacuum sweepers, a TV set, a Kenmore cleaner that belonged to Goodwill?

Cardwell: Yeah.

Court: How did you come into possession of these items?

Cardwell: I was loading up some stuff in a car the guy gave me, and they was sitting there and I thought I could use them.

Mr. Brinson [Defense Counsel]: He was at the Goodwill and a person was unloading some things, so he said, "Can I have these?" and he said, "Yes," and there were some other items there which he hadn't unloaded sitting there.

Cardwell: I don't know if he did or not.

Mr. Brinson: Well, he didn't see him unload them. They belonged to ostensibly Goodwill. They were left on Goodwill's doorstep.

Court: It wasn't from the store. I[t] was from one of the pickups?

Cardwell: Behind the building.

Court: Where? Covert?

Cardwell: Covert and Weinbach.

Court: And when you took them, did you intend to keep them?

Cardwell: Yes.

Court: What were you going to use them for?

Cardwell: I was going to fix the TV up to watch. We've got a vacuum cleaner that was broke, so I was gonna take the parts out of that to fix it up and . . .

Court: Show a factual basis for the defendant's plea. . . .

Appellant's Appendix at 104-06. The trial court then advised Cardwell of his rights and accepted the plea agreement, sentencing him to three years in prison with one year suspended to participation at a local S.A.F.E. House. The habitual offender allegation was dismissed.

On July 17, 2003, Cardwell filed a petition for post-conviction relief claiming that his guilty plea was invalid due to lack of a sufficient factual basis, protestations of innocence and misadvice as to the potential penalty for the habitual offender allegation as well as a claim for ineffective assistance of trial counsel. At the post-conviction hearing, John Brinson ("Brinson"), who served as Cardwell's trial counsel, testified that he did not have any memory of the case and did not recognize Cardwell. Brinson also testified that he did not recall what he had advised Cardwell as to the possible reduction of the penalty for the habitual offender allegation, but in general he kept up fairly well with statutory changes. Cardwell testified that at the time he pled guilty to the theft charge that it was his understanding that he would have received thirty years imprisonment if the habitual offender allegation had been found to be true. Cardwell testified that his attorney, Brinson, did not advise him that, depending on the facts of a particular case, the sentence for a habitual offender allegation could be reduced to as low as five years.[3] He testified that had he known

[3] Ind. Code § 35-50-2-8(e)-(f) (Burns 1986 Supp.) read in pertinent part:

about this possible reduction, he would not have pled guilty. The State also presented evidence supporting its asserted laches defense.

On October 10, 2006, the post-conviction court issued its findings of fact, conclusions of law, and judgment. The post-conviction court concluded that the State did not prevail on its laches defense, that Cardwell was not entitled to post-conviction relief, and denied Cardwell's petition. Cardwell now appeals.[4]

Discussion and Decision

Standard of Review

The petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. Mills v. State, 855 N.E.2d 296, 299 (Ind. Ct. App. 2006). When appealing from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. Id. On review, we will not reverse the judgment unless the evidence as a whole unerringly and unmistakably leads to a conclusion opposite that reached by the post-conviction court. Id. Upon reviewing a petition for post-conviction relief, we may consider only the evidence and reasonable inferences supporting the judgment of the post-conviction court. Culvahouse v. State, 819 N.E.2d 857,

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> (e) The court shall sentence a person found to be an habitual criminal to an additional fixed term of thirty (30) years imprisonment . . . . If at least one (1) of the offenses relied upon to establish that the person has accumulated two (2) prior unrelated felonies is a Class D felony, then the court may subtract up to ten (10) years from the additional fixed term of thirty (30) years. If the felony for which the person is being sentenced is a Class D felony, then the court may subtract up to twenty (20) years from the additional fixed term of thirty (30) years. (f) Notwithstanding the court's authority to reduce the additional fixed term of thirty (30) years of imprisonment under subsection (e), if a person is found to be an habitual offender under this section, the court shall sentence the person to an additional fixed term of at least five (5) years . . .

860 (Ind. Ct. App. 2004), trans. denied.

The post-conviction court in this case entered findings of fact and conclusions of law. A post-conviction court's findings and judgment will be reversed only upon a showing of clear error that leaves us with a definite and firm conviction that a mistake has been made. Id.

I. Validity of Guilty Plea

On appeal, Cardwell asserts that the post-conviction court erred in denying him relief because his guilty plea was invalid due to a lack of an adequate factual basis, his protestation of innocence, and because he received material misadvice as to the potential sentence enhancement due to the habitual offender allegation. We address each contention in turn.

A. Factual Basis

Pursuant to Indiana Code Section 35-35-1-3(b), a trial court may not accept a guilty plea unless it determines that a sufficient factual basis exists to support the plea. The factual basis requirement primarily ensures that when a plea is accepted there is sufficient evidence that a court can conclude that the defendant could have been convicted had he stood trial. Butler v. State, 658 N.E.2d 72, 76 (Ind. 1995). A finding of factual basis is a subjective determination that permits a court wide discretion, which is essential due to the varying degrees and kinds of inquiries required by different circumstances. Id. at 76-77. A factual basis exists when there is evidence about the elements of the crime from which a court could reasonably conclude that the defendant is guilty. Id. at 77. Trial court determinations of adequate factual basis, like other parts of the plea process, arrive here on appeal with a

[4] The State does not appeal the post-conviction court's ruling on its laches defense.

presumption of correctness. Id. We typically review claims of error about pleas under an abuse of discretion standard. Id. This standard is also appropriate where, as here, the Petitioner asks that his plea be set aside through a motion for post-conviction relief on grounds that the factual basis was inadequate. See id.

A post-conviction petitioner must, in addition to proving the lack of a factual basis, also prove that he was prejudiced by the lack of a factual basis. Wilson v. State, 707 N.E.2d 318, 321 (Ind. Ct. App. 1999). Evidence proving that the petitioner did not commit the crime would meet this burden. Id.

An adequate factual basis for the acceptance of a guilty plea may be established in several ways: (1) by the State's presentation of evidence on the elements of the charged offenses; (2) by the defendant's sworn testimony regarding the events underlying the charges; (3) by the defendant's admission of the truth of the allegations in the information read in court; or (4) by the defendant's acknowledgment that he understands the nature of the offenses charged and that his plea is an admission of the charges. Oliver v. State, 843 N.E.2d 581, 588 (Ind. Ct. App. 2006), trans. denied. To be guilty of theft, a defendant must have knowingly or intentionally exerted unauthorized control over the property of another with the intent to deprive the person of any part of its value or use. See Ind. Code § 35-43-4-2(a) (1985).

At Cardwell's guilty plea hearing, the trial court read the charging information to Cardwell, who indicated that he understood it and that he understood by pleading guilty he was admitting the truth of the allegations in the charging information. Furthermore, Cardwell

signed a written acknowledgement of rights that includes the question: "Do you understand that by your plea of guilty you are admitting the truth of all the facts alleged in the indictment/information and upon entry of such plea, the Court will proceed with judgment and sentence?" PCR Petitioner's Exhibit 6. Cardwell marked "Yes" in response to that question. In Lowe v. State, our Supreme Court held that a defendant's admission of guilt after hearing a recitation of the charges against him can be a sufficient factual basis. Lowe v. State, 455 N.E.2d 1126, 1129 (Ind. 1983).

Cardwell asserts that the reading of the charges did not include the mens rea element of theft, i.e. that Cardwell knowingly exerted unauthorized control. In reciting the charges, the trial court stated: "[Y]ou are charged with exerting unauthorized control over property in the custody of Goodwill. . . ." App. at 104. Despite the trial court's failure to use the term knowingly in reading the charge, there is still sufficient evidence to support a factual basis for the mens rea element. The factual basis of a guilty plea need not be established beyond a reasonable doubt. DeWitt v. State, 755 N.E.2d 167, 172 (Ind. 2001). Rather, relatively minimal evidence can be adequate. Id.

Here, the trial court asked Cardwell how he acquired the property listed in the charging information. Cardwell replied that while he was in Goodwill's parking lot, he received permission from a donor to take certain items that he saw the donor unload, loaded those items in his car, and loaded additional property from the parking lot but he did not know who had donated the additional items. From Cardwell's responses to the trial court's inquiries, it would be a reasonable conclusion that Cardwell knew he was exerting

unauthorized control over another's property because he knew he was on someone else's land and took away property that he did not receive permission to take.

Cardwell also asserts that the State could not have proven the elements of the crime because there was no evidence that Goodwill had accepted the gifts of property and thus was not the owner of the property. Although acceptance is an essential element in the making of a gift, the acceptance of a gift, which is beneficial to the donee and otherwise complete, will be presumed even if the donee did not know of the gift at the time it was made. Klingaman v. Burch, 216 Ind. 695, 700-701, 25 N.E.2d 996, 998-999 (1940). This presumption is applicable to these facts, and therefore, a sufficient factual basis was presented to support Cardwell's guilty plea.

B. Expression of Innocence

Second, Cardwell contends that he maintained that he was innocent during the guilty plea proceedings. A judge may not accept a guilty plea when the defendant both pleads guilty and maintains his innocence at the same time. Bland v. State, 708 N.E.2d 880, 881-882 (Ind. Ct. App. 1999). To accept such a plea constitutes reversible error. Id.

Cardwell points to the following exchange as the point at which he asserted he was innocent:

> Court: On the 8th of February, did you come into possession of, or did you take possession of some vacuum sweepers, a TV set, a Kenmore cleaner that belonged to Goodwill?
>
> Cardwell: Yeah.
>
> Court: How did you come into possession of these items?

> Cardwell: I was loading up some stuff in a car the guy gave me, and they was sitting there and I thought I could use them.
>
> Mr. Brinson [Defense Counsel]: He was at the Goodwill and a person was unloading some things, so he said, "Can I have these?" and he said, "Yes," and there were some other items there which he hadn't unloaded sitting there.
>
> Cardwell: I don't know if he did or not.
>
> Mr. Brinson: Well, he didn't see him unload them. They belonged to ostensibly Goodwill. They were left on Goodwill's doorstep.

App. at 105-06. Cardwell acknowledged that he had permission to take some of the items, but Cardwell did not allege that he was given permission to take all of the items. Rather, his comments just reveal that he did not know who had unloaded or donated the vacuum cleaners and the television set. This exchange does not amount to Cardwell maintaining that he was innocent.

C. Misadvice

Cardwell also argues that his guilty plea should be set aside because his decision to plead guilty was the product of misadvice as to the potential sentence enhancement from the habitual offender allegation. The prosecutor created a document detailing the sentencing recommendation for the charge of theft if Cardwell's guilty plea was accepted. It read in part: "Count II HABITUAL CRIMINAL, enhancement of a felony conviction to thirty (30) years." App. 119 Cardwell asserts that this document led him to believe that the habitual offender allegation was an automatic enhancement of thirty years when in actuality a trial court could reduce such an enhancement based on the severity of the prior and current convictions. Cardwell claims that this motivated his decision to plead guilty and that neither

his defense counsel nor the trial court informed him of the true minimum and maximum penalties associated with the habitual offender allegation.

In support of his argument, Cardwell uses language from White v. State, 497 N.E.2d 893 (Ind. 1986). Our Supreme Court held that defendants who can prove that they were actually misled by the judge, the prosecutor, or defense counsel about the choices before them will present colorable claims. Id. at 905. However, it also noted that a plea entered after the trial judge has reviewed the various rights that the defendant is waiving and made the inquiries required by Indiana Code Section 35-35-1-2 is unlikely to be found wanting in collateral attack. Id.

The portion of this statute implicated requires the trial court to determine that the defendant has been informed of the maximum and minimum possible sentence for each crime charged. However, the statute does not mandate that the trial court advise the defendant of potential sentences for offenses to which he will not be subjected if his guilty plea is accepted. See Hutchinson v. State, 501 N.E. 2d 1062, 1066 (Ind. 1986) (quoting Brown v. State, 443 N.E.2d 316, 319 (Ind. 1983)). "Defendant is entitled to be informed of the actual penal consequences of his plea of guilty, not the hypothetical result of a trial on a charge which the State has agreed not to prosecute in return for the plea." Brown v. State, 443 N.E.2d 316, 319 (Ind. 1983). Pursuant to the plea bargain, the State dismissed the habitual offender allegation. Therefore, Cardwell does not present a colorable claim.

II. Ineffective Assistance of Counsel

Finally, Cardwell contends that his trial counsel's assistance was ineffective because

he failed to raise the defense that Goodwill did not own the property and failed to advise Cardwell of the minimum and maximum possible years that the habitual offender allegation could enhance a theft conviction. We first address the allegation that Cardwell's trial counsel failed to raise a valid defense.

Effectiveness of counsel is a mixed question of law and fact. Strickland v. Washington, 466 U.S. 668, 698 (1984). We evaluate Sixth Amendment claims of ineffective assistance under the two-part test announced in Strickland. Id. To prevail on an ineffective assistance of counsel claim, a defendant must demonstrate both deficient performance and resulting prejudice. Dobbins v. State, 721 N.E.2d 867, 873 (Ind. 1999) (citing Strickland, 466 U.S. at 687). Deficient performance is that which falls below an objective standard of reasonableness. Strickland, 466 U.S. at 687; see also Douglas v. State, 663 N.E.2d 1153, 1154 (Ind.1996). Prejudice exists when a claimant demonstrates that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694; see also Cook v. State, 675 N.E.2d 687, 692 (Ind. 1996). The two prongs of the Strickland test are separate and independent inquiries. Strickland, 466 U.S. at 697. Thus, "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed." Id.

Moreover, under the Strickland test, counsel's performance is presumed effective. Douglas, 663 N.E.2d at 1154. A petitioner must present convincing evidence to overcome the strong presumption that counsel rendered adequate assistance and made all significant

decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 690; Broome v. State, 694 N.E.2d 280, 281 (Ind. 1998).

Where the appellant claims that ineffective assistance of counsel caused the appellant to plead guilty, the appellant must show that there is a reasonable probability that he would have been found not guilty had he gone to trial on the charge. Toan v. State, 691 N.E.2d 477, 479 (Ind. Ct. App. 1998).

Cardwell argues that he is not guilty as a matter of law because the property was not owned by Goodwill due to lack of acceptance. As discussed above, acceptance of a gift is presumed when it is beneficial to the donee and otherwise complete, despite the donee not having knowledge of the gift at the time it was made. Klingaman, 216 Ind. at 700-701, 25 N.E.2d at 998-999. Cardwell has not demonstrated that there is a reasonable probability that he would have been found not guilty had he gone to trial on the charge.

Cardwell also alleges that his trial counsel misadvised him as to the potential sentence enhancement from the habitual offender allegation, which was ultimately dismissed pursuant to the plea agreement with the State. Cardwell claims that had he known that the enhancement could be reduced from thirty years to as little as five years, he would not have pled guilty.

In Segura v. State, our Supreme Court announced a separate and distinct standard for demonstrating prejudice for allegations of misadvice as to the penal consequences of pleading guilty:

> Accordingly, we conclude that in order to state a claim for postconviction relief a petitioner may not simply allege that a plea would not have been

> entered. Nor is the petitioner's conclusory testimony to that effect sufficient to prove prejudice. To state a claim of prejudice from counsel's omission or misdescription of penal consequences that attaches to both a plea and a conviction at trial, the petitioner must allege . . . "special circumstances," or, as others have put it, "objective facts" supporting the conclusion that the decision to plead was driven by the erroneous advice.

Segura v. State, 749 N.E.2d 496, 507 (Ind. 2001). Cardwell does not present such a claim because the penal consequences Cardwell alleges his trial counsel omitted to tell him only came into play if a trial was held and he was found guilty. The State dismissed the habitual offender allegation upon Cardwell's guilty plea.

Based on the foregoing analysis, the post-conviction court did not err in denying Cardwell's petition for post-conviction relief.

Conclusion

In conclusion, there was a factual basis for Cardwell's guilty plea, and Cardwell did not allege that he was innocent. The trial court was not required to inform Cardwell of the potential sentence regarding the habitual offender allegation because it was dismissed by the State. Finally, Cardwell did not demonstrate that he was prejudiced by the assistance provided to him by his trial counsel. Therefore, the post-conviction court properly denied the petition of Cardwell for post-conviction relief.

Affirmed.

SHARPNACK, J., and MAY, J., concur.